SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 282

SWIFT & COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM ON BEHALF OF INTERVENERS

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
MARTIN M. LUCENTE,
GUY A. GLADSON,
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Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, the railroad appellees,[1] The Union Stock Yard and Transit Company

[1] The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Baltimore and Ohio Railroad Company, The Belt Railway Company of Chicago, The Chesapeake and Ohio Railway Company, Chicago & Eastern Illinois Railroad Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago, Indianapolis and Louisville Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago River and Indiana Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Chicago South Shore and South Bend Railroad, Erie Railroad, Grand Trunk Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Indiana Harbor Belt Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Com-

of Chicago, The Chicago Live Stock Exchange, Chicago Traders Live Stock Exchange, National Live Stock Producers Association, and Chicago Producers Commission Association, interveners in the District Court and appellees herein, move that the final order and decree of the District Court be affirmed.

This is a direct appeal from a final order and decree entered on June 21, 1951, by a three-judge District Court, specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, dismissing appellant's complaint which sought to enjoin, set aside and annul a report and order of the Interstate Commerce Commission.

On July 29, 1947, appellant, Swift & Company, filed a complaint with the Interstate Commerce Commission which, as subsequently amended, alleged, in substance, that the charges on direct shipments of livestock in carloads from points in states other than Illinois, for delivery to appellant's plant at Chicago, were unreasonable, unduly prejudicial to livestock as a commodity, and preferential of appellant's competitors at points in Illinois, Iowa, Nebraska, Missouri, Kansas, Minnesota, Wisconsin, and Indiana, all in violation of Sections 1 and 3 of the Interstate Commerce Act, 49 U.S.C. §§ 1 and 3. Appellant asked the Commission to prescribe rates, charges, rules, regulations or practices, including joint through rates, under which appellant's direct shipments of livestock would be delivered at its private track at the line-haul rates to Chicago. (Appellant's Complaint before the Commission, Exhibit A to Appellant's Complaint in the District Court.)

There were numerous interventions in opposition to the complaint on behalf of the Union Stock Yards, producers, buyers and sellers of livestock. After a full hear-

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pany, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, and Wabash Railroad Company.

ing, including oral argument and an extended presentation on brief, the Commission, by order and report, dismissed the complaint. (*Swift & Co.* v. *Atchison, T. & S.F. Ry. Co.*, 274 I.C.C. 557.)

As the basis for its dismissal of appellant's complaint, the Commission found that the line-haul rates on carload shipments of livestock to Chicago, previously prescribed by it (*Livestock-Western District Rates*, 176 I.C.C. 1; *Chicago Livestock Exchange* v. *A.T. & S.F. Ry. Co.*, 219 I.C.C. 531), were not designed nor intended to compensate the carriers for the livestock delivery service sought by appellant, and that, considering the transportation service required for such delivery and all of the attending facts and circumstances, the published switching charge of the Chicago Junction Railway in addition to the line-haul rates was not unreasonable nor otherwise unlawful for deliveries of livestock to appellant's private tracks. (274 I.C.C. 557 at 574-76.) The Commission also found that the establishment of joint rates for this traffic, as requested by appellant, would not be necessary or desirable in the public interest. (274 I.C.C. 557 at 576.)

In response to appellant's allegation of prejudice to livestock as a commodity, the Commission found that "the measure of transportation services rendered shipments of live animals is substantially greater than that accorded dead freight." (274 I.C.C. 557, at 563.) Appellant's claim that the published charges were prejudicial to it and preferential of its competitors at certain points was similarly disposed of by findings that the transportation services, conditions, and circumstances at each of the allegedly preferred points were substantially dissimilar from those attending delivery of livestock at appellant's private track.[2]

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[2] This dissimilarity is due primarily to the long-established practice of delivering livestock within this greatly congested area of Chicago only at the public Stock Yards. The evidence (Exhibit 42) proves that for many

(274 I.C.C. 557, at 574-75.) The Commission also referred to its decision in a previous case entitled *Hygrade Food Products Corp.* v. *A.T. & S.F. Ry. Co.*, 195 I.C.C. 553, where it had found the identical switching charge here assailed not unreasonable or otherwise unlawful for performance of the same service now demanded by appellant.[3]

In the proceedings before the District Court, comprehensive briefs were filed, and an entire day was consumed in oral argument. Appellant then presented each and every issue which it raises here. After a full hearing, the District Court found that the Commission's findings were adequately supported by the evidence of record and were in accordance with the applicable statutory standards and

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years Swift and the other Chicago packers insisted upon receiving their direct shipments of livestock at the Union Stock Yards. In return for a substantial proprietary interest in the Stock Yards, Swift and other Chicago packers in 1892 abandoned their private facilities for the receipt of livestock, such as Swift would again construct, and agreed that "they would not interest themselves in any other stock yards for the receipt and use of their own livestock." (*Swift & Co.* v. *United States*, 316 U. S. 216, at 229; Exhibit 42) The unique physical development of the stock yards area in Chicago and the unusual, and onerous transportation services required to deliver livestock at Swift's proposed private stock yards, stem directly from this action by the packers. Commenting upon the history of the delivery practice in Chicago in the prior *Swift case* (238 I.C.C. 179, 188) the Commission said with reference to the same evidence now embraced in Exhibit 42:

> "For many years, the packers including the complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stockyards for a substantial consideration and by their covenants with the Yards Company, made the Union Stock Yards their own terminal facilities at Chicago."

On appeal this Court addressing itself to the same point declared:

> "It was the packers themselves who suppressed the competitive yards and alternative facilities for unloading their stock." (*Swift & Co.* v. *United States*, 316 U. S. 216 at 230)

[3] On appeal to this Court, the Commission's findings as to certain other unrelated issues were held to be inadequate, but its determination of the issue here was not challenged. (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193)

principles of law. (Conclusions of Law, 1-4, Exhibit A to Appellant's Statement As To Jurisdiction) An order dismissing appellant's complaint was thereafter entered by the Court. It is plain that the Commission's report and order and the District Court's decision affirming the Commission's action involve nothing more than the application of well-settled principles of law to undisputed facts within the field in which the Commission has long been recognized by this Court to be an expert body.

As noted above, appellant's primary purpose in the proceeding before the Commission was to secure a ruling that the published charges for the delivery service which it desires at its proposed private stock yard were, and are, unreasonable, and otherwise unlawful. The measure of the rate was the principal matter in issue before the Commission, and the validity of the Commission's action with respect thereto is necessarily the principal issue raised by appellant here. Appellant contends, therefore, that an appeal from a determination by the Commission, affirmed by the District Court, that a particular rate, applying to a single commodity, is not unreasonable or otherwise unlawful, presents substantial questions for this Court to decide.

With respect to the Commission's findings that the charge in question is not unreasonable or otherwise unlawful, it would seem indisputable that no substantial question is involved. This Court has repeatedly held that the lawfulness of a particular rate or rates is a matter for the informed judgment of the Commission, and the determination of that expert body will not be disturbed if supported by substantial evidence of record. (*Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541; *Skinner & E. Corp.* v. *United States*, 249 U.S. 557; *Swift & Co.* v. *United States*, 316 U.S. 216; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Ayrshire Corp.* v. *United*

States, 335 U.S. 573.) The District Court found that the Commission's findings had the requisite support and that the Commission's action conformed to the governing principles of law. (Conclusions of Law, 1-4, Exhibit A to appellant's Statement As To Jurisdiction) Cursory reference to the Commission's report will demonstrate the correctness of that determination by the District Court.

In its exhaustive consideration of the issues raised by appellant's complaint, the Commission discussed at length the detailed evidence introduced by the defendants (appellees here) designed to show the operating conditions involved in and the transportation services required to effect delivery of livestock at appellant's private yards. It considered and weighed the conditions and circumstances involved in making delivery at the points alleged to be preferred and in regard to the commodities supposedly receiving preferred treatment from the carriers. The Commission found that the services required, and all other relevant conditions and circumstances, justified the measure of the charge. (274 I.C.C. 557, at 575-76) It also found that there was no showing of similar conditions and circumstances with respect to transportation services at points allegedly preferred (274 I.C.C. 557, at 575), that a substantial dissimilarity was shown as to certain allegedly preferred points (274 I.C.C. 557, at 574), and that allegedly preferred commodities required substantially less transportation service than that accorded livestock. (274 I.C.C. 557, at 563) These findings are in accord with the legal standards which must be applied in determining the lawfulness of transportation charges, and the District Court so found. (*Interstate Commerce Commission* v. *Union Pacific R.R.*, 222 U.S. 541, at 549-50; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, at 481-82; *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, at 6-7; *United States* v. *Wabash*

R. Co., 321 U.S. 403, at 410-13; Conclusions of Law, 1-4, Exhibit A to appellant's Statement As To Jurisdiction.) [4]

The issues presented by this appeal thus arise in an area where the applicable legal principles are well settled, and as shown above, the Commission's findings conformed with those principles in every respect. Furthermore, this Court has repeatedly recognized the Commission's expert competence in its special field, and has consequently restricted the matters which it will consider on appeal. Because of these elementary and well-settled rules, the issues open for review in this case do not present any substantial questions not previously determined by this Court.

Moreover, this appeal involves the same questions before the Court in *Atchison, Topeka & Santa Fe Railway Co.* v *United States*, 295 U.S. 193. As shown by the Commission's report in that case (*Hygrade Food Products Corp.* v. *Atchison, T. & S.F. Ry. Co.*, 195 I.C.C. 553) the Hygrade Company, a Chicago packer with a plant located in the same area as appellant's packinghouse, filed a complaint with the Commission alleging, among other things, that the published switching charge in addition to the line-haul rates for delivery of livestock at its private track, was unreasonable, discriminatory, prejudicial and preferential. (195 I.C.C. at 553) The switching charge attacked in that case was the identical charge assailed by appellant in this proceeding, subject only to authorized general rate increases since that time, and the Commission so found. (274 I.C.C. 557 at

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[4] Appellant contends that the Commission erred in failing to find violations of §§ 1(9) and 2 of the Interstate Commerce Act. (Statement As To Jurisdiction, p. 3) In its complaint before the Commission appellant did not raise those issues, and they cannot, therefore, be raised here. *United States* v. *Capital Transit Co.*, 338 U. S. 286, at 291; *United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, at 297-98; *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, at 526. In any event, the Commission's findings noted above dispose of any contention that there is any unlawful discrimination or any other violation of §§ 1(9) and 2.

573) The Commission found in that case, as it has in this proceeding, that "the assailed switching charge on carloads of livestock placed for delivery at complainant's plant is not shown to be unreasonable or otherwise unlawful." (195 I.C.C. 553 at 558) On appeal to this Court, the Commission's finding as to the lawfulness of the switching charge was specifically noted in language that leaves no doubt as to the similarity between that proceeding and this. The Court stated:

> "Consignee sought free delivery in cars switched into its plants, but the Commission found the switching charge not unreasonable" (295 U. S. 193 at 200).

In addition to its attack on the switching charge, the Hygrade Company sought free use of certain Yard Company facilities in connection with deliveries at the Union Stock Yards (295 U. S. 193 at 200). This second issue was determined in favor of the Hygrade Company, but was reversed on appeal because the Commission failed to make adequate findings in support of that aspect of its order (295 U. S. 193 at 201-202). This reversal, however, did not relate to the determination that the switching charge was not unreasonable or otherwise unlawful, and it is that aspect of the case which is again presented to this Court by the appellant in this proceeding.

In the argument by which it attempts to show—that the questions raised are substantial, appellant pretends to find an unwarranted discrimination in the fact that the published charges for private track delivery of its livestock exceed the charges applicable to certain other traffic. (Appellant's Statement As To Jurisdiction, p. 10) There is not the slightest reference in this argument to the Commission's findings in regard to the dissimilarity between the transportation services, circumstances and conditions attending delivery of livestock to appellant's private track and delivery of the shipments supposedly receiving preferred

treatment. It is obvious, of course, that the Commission's findings, noted above, disprove any discrimination.

In view of these findings and the evidence of record which sustains them, appellant then attempts to divert attention from the issues presented by its complaint before the Commission by an extended discussion—of extraneous and irrelevant matters. The agreement referred to in paragraph 2 (Appellant's Statement As To Jurisdiction, p. 11) was introduced in the hearings before the Commission by the appellant. It has no relation to the reasonableness or lawfulness of the published charges. The sole issue raised by appellant's complaint before the Commission, and neither the defendant carriers nor any of the other appellees have at any time sought to justify such charges by reference to that covenant. In its report, the Commission found that the asserted contractual relationship between the Chicago Junction Railway and the Union Stock Yards was subject to the conditions imposed in *Chicago Junction* case, 71 I. C. C. 631,[5] and that those conditions were effective to prevent the operation of the Chicago Junction Railway for the special advantage of the Union Stock Yards (274 I. C. C. 557, at 575).

The second attempt to divert the Court's attention from the issues involved in this proceeding may be found in the extended discussion of the Chicago Junction's legal status and the assertion that the Commission's decision was based on an inadequacy of the Chicago Junction's motive power (Appellant's Statement As To Jurisdiction, pp. 11-12). Appellant does not explain how the Chicago Junction's status, whether it be regarded as an independent carrier (*Chicago Junction* Case, 71 I. C. C. 631, at 639-41) or part

[5] The Commission retained jurisdiction of that proceeding for the purpose of making such amendments or modifications of its conditions as might become necessary or desirable in the public interest. (71 I.C.C. 631 at 641)

of the New York Central, impinges in any manner upon the findings made by the Commission in determining the reasonableness and lawfulness of the assailed switching charge. The truly significant facts as to the transportation, conditions and circumstances in the Chicago Stock Yards area would not vary with a variation in the Chicago Junction's legal status, and the argument which assumes, but does not explain, why that status is important here is, therefore, irrelevant. So far as the claimed inadequacy of motive power is concerned, the Commission's decision dispels any assumption that any such factor was used to support its findings. There is a single passing reference to motive power in the Commission's report (274 I. C. C. 557 at 566), and the matter is not thereafter alluded to, nor does it enter into the Commission's findings.

The contention that the Commission erred in failing to find a violation of § 1(9) is equally without merit (Appellant's Statement As To Jurisdiction, pp. 12-13). Under the commission's order in this case, appellant can receive its direct shipments of livestock over its private track upon payment of the charge found to be not unreasonable, discriminatory or otherwise unlawful, and Section 1(9) does not require more. In support of its argument on this particular aspect of the case, and at numerous other points throughout its Statement As To Jurisdiction, appellant cites *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169. In that case, the carriers serving appellant's plant at Cleveland had for many years delivered livestock to appellant's plant without any charge in addition to the line-haul rates and the performance of that service at the line-haul rates was expressly authorized by the published tariffs. The defendant carriers continued to perform that service for appellant's competitors while refusing it to appellant (*Swift & Co.* v. *Baltimore & Ohio R. Co.*, 266 I. C. C. 55, at 60, 333 U. S. 169, at 174, Footnote No. 3)

Here, however, private track delivery of livestock to any of the packers in the stockyards area has never been performed at the line-haul rates, and the Commission expressly found that the line-haul rates do not cover livestock deliveries at appellant's private track (274 I. C. C. 557 at 559 and 574-75). *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169 did not involve any controversy as to the measure of the charge for the delivery sought by appellant. As stated by this Court:

> "Ownership of Track 1619 by Stock Yards and its objection to livestock deliveries is, in fact, the only reason suggested for the railroad's failure to deliver shipments of livestock to Swift as they do to neighboring packers . . ." (333 U. S. 169 at 175).

The carriers here make no such defense. The published charges for private track delivery of livestock at appellant's plant are the same as those available to the other Chicago packers for that same type of delivery. What appellant seeks here is a basis of rates for private track delivery that would place it in a preferred position over any other Chicago packer desiring that character of service.

In its report herein, the Commission considered appellant's argument that the *Cleveland* case supported its demands in this proceeding, and found:

> "There is no showing of a similarity in any respect of the services required and circumstances affecting services" (274 I. C. C. 557 at 575).

Appellant's reliance upon *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169, thus utterly disregards the fact that dissimilar situations produce different results.

We respectfully submit, therefore, that appellant presents no substantial question for the decision of this Court,

and that the order and decree of the District Court should be affirmed.

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